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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 522

PAUL B. ROBERTS, Administrator with the will annexed of the Estate of Joseph deR. Moreno, deceased,
Petitioner,

v.

MARJORIE EILEEN BATHURST, Executrix of the Estate of Joseph deR. Moreno, deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR MARJORIE EILEEN BATHURST, AS EXECUTRIX, ETC., IN OPPOSITION

OPINION AND JUDGMENT BELOW

The opinion of the Circuit Court of Appeals (112 F. 2d 543) will be found at page 99 of the Record. The District Court filed no opinion.

The judgment sought to be reviewed was entered on June 13, 1940 and will be found at page 103 of the Record. A petition for re-hearing was filed on July 1, 1940 (R. 104) and was denied on July 24, 1940 (R. 108). The petition for certiorari was filed on October 24, 1940.

The decree of the United States District Court for the Northern District of Florida (referred to herein as "the District Court"), will be found at pages 46 to 47 of the Record.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A., Section 347 (a)).

QUESTIONS INVOLVED

1. When a United States District Court, having jurisdiction of an interpleader suit and of both claimants to the deposited proceeds of a life insurance policy payable to the insured's personal representative, has awarded the fund to the executrix and sole beneficiary of a will probated in a state court within the District and has dismissed her adversary's claim (1) that the will is invalid and (2) that such adversary is entitled to the fund (a) as sole next of kin entitled to take because of the alleged intestacy and (b) as collector of the estate appointed in a foreign jurisdiction asserted to be the domiciliary jurisdiction,—and such award was made to await and follow a decree of said probate court rendered in a litigation between the same parties in which the same claim was presented and similarly decided,—is a third party subsequently entering the interpleader to claim the fund as foreign administrator with an earlier will annexed, by appointment in a second foreign jurisdiction, of which earlier will the defeated claimant was named as sole beneficiary and executrix, en-

titled to a trial by the District Court of his contention that insured's domicile at death was in such second foreign jurisdiction?

2. In any event, is such foreign administrator c. t. a. entitled to such trial under such circumstances when he has been appointed at the instance of such unsuccessful claimant and by virtue of her renunciation in his favor of her executorship under the earlier will and he has awaited the unfavorable outcome of the local probate court litigation and of the interpleader suit before appearing and asserting his claim in the latter?

STATEMENT

Major Joseph deR. Moreno, Medical Corps, United States Army, died on October 16, 1936. He carried an insurance policy issued on November 21, 1935 by Travelers Insurance Company, insuring his life for $5,000 in favor of his executor or administrator (R. 22). The right to the proceeds of that policy, as between the executrix of the Major's will, admitted to probate in Florida, and the wife from whom he had obtained a decree of divorce in Florida, the domicile of his origin and at his entry into the Army (R. 70-71, 35, 82-86), is the issue involved in the case at bar. That issue has twice been resolved in favor of the executrix (respondent here), and against the divorced wife, first, by the Florida probate court (R. 58), and, later, by the decree of the District Court in the interpleader suit at bar (R. 58-59).

Later the present petitioner, Roberts, entered the suit at bar and sought to re-litigate the issue thus twice determined

against Mrs. Moreno. The courts below denied his right to do so.

About a year before his death and prior to the entry of his divorce decree, and on October 18, 1935, Major Moreno executed his will (R. 63), in which he recited that he had provided for his wife, Therese Moreno, by a declaration of trust of even date and, for that reason, "made no provision for her in this my will", and by which he devised and bequeathed his estate to respondent, Marjorie Eileen Bathurst, whom he also named as executrix. The will was admitted to probate in the County Judge's Court of Escambia County, Florida (elsewhere referred to in this brief as "the probate court"), and respondent qualified as executrix thereof on November 21, 1936 (R. 60).

On February 1, 1937 respondent, as such executrix, filed her declaration in the case at bar in the Circuit Court of Escambia County, against Travelers Insurance Company, to recover the proceeds of the policy (R. 1). The case was removed to the District Court and on April 9, 1937 the Insurance Company (pursuant to 28 U. S. C. A., Section 41, Subdivision 26(e), as amended by the Act of June 20, 1936, c. 13, sec. 1, 49 Stat. 1096), filed its answer and equitable plea, paid the proceeds of the policy into the registry of the District Court and interpleaded Therese Marie Moreno, individually and as Collector of the estate (under *ex parte* appointment as such Collector in the District of Columbia on November 25, 1936, R. 21-25 and 32).

On July 12, 1937 Mrs. Moreno appeared and answered the equitable plea (R. 53-54), alleging that the Major's will was invalid because of mental incompetency and undue in-

fluence and that she was entitled to the proceeds of the insurance policy as the domiciliary personal representative. She also alleged invalidity of the Major's decree of divorce and asserted a right to the proceeds of the policy as the Major's widow and sole "heir at law" (R. 54).

On July 20, 1937 respondent moved to dismiss Mrs. Moreno's claim (R. 55), but the District Court, by order made on August 20, 1937, recited that the Florida will was under attack by Mrs. Moreno in the probate court and stayed all proceedings in the instant suit "until the validity of said will shall have been determined by said County Judge's Court and until the further order of this Court" (R. 56).

Proceedings in the probate court which led to the last-mentioned stay of the proceedings below.

On July 16, 1937 Mrs. Moreno, individually and as Collector, filed a petition in the probate court to revoke the probate of the Major's will, in which petition (R. 32) she raised the same issues as those raised by her answer and claim filed four days earlier in the case at bar. On July 20, 1937 respondent answered and joined issue on the petition to revoke (R. 32).

By its judgment entered on March 7, 1939 the probate court denied and dismissed the petition to revoke probate (R. 87). *No appeal was taken from that decree.*

On October 12, 1937 Mrs. Moreno also filed in the probate court an election to take dower and, on November 1, 1937, a petition for an assignment of dower (R. 33), Respondent again joined issue (R. 33). Under Section 7065, Compiled General Laws of Florida (see appendix) if Mrs. Moreno were really the widow and could successfully

attack the will, she would take all; under other appropriate statutes she could claim dower, even if the will were valid. After the taking of depositions and the introduction of evidence and after the expiration of the time limited by the probate court for the completion of Mrs. Moreno's testimony, she attempted to withdraw her claim to dower without prejudice, but the probate court by judgment dated May 16, 1939 denied the application, recited that it had considered the election to take dower and the application for an assignment thereof and that respondent had "entitled herself to a disposition of said cause upon the merits", and decreed that Mrs. Moreno take nothing by her election to take dower (R. 88-90). *No appeal was taken from that decree.*

Following the denial of the petition to revoke probate the District Court, by judgment dated April 5, 1939, vacated the stay and decreed dismissal of Mrs. Moreno's claim to the insurance money, both in her individual capacity and in her capacity as Collector (R. 58-59). Respondent's motion for said judgment was based upon the judgment of the probate court determining the validity of the Major's will (R. 57-58). *Mrs. Moreno did not appeal from the judgment of the District Court dismissing her claim.*

Entry of present petitioner into the litigation

After the District Court's dismissal of Mrs. Moreno's claim, and on May 11, 1939, the present petitioner entered the suit and filed an answer and claim (R. 25-28) in which he sought to revive the very questions already disposed of by the probate court and the District Court, alleging, how-

ever, that the Major was domiciled in Massachusetts at the time of his death, that claimant (Roberts) had been appointed administrator c. t. a. in that State (under a will purportedly executed on April 21, 1919, R. 73-74 and filed for probate on October 28, 1937) and that he was entitled to administer the proceeds of the policy.

Respondent moved for a summary judgment under Rule 56,* upon the record and the affidavit and exhibits annexed to the notice of motion (R. 29-37). The petitioner filed counter-affidavits (R. 37-46) and on June 6, 1939 the District Court adjudged the petitioner's claim invalid and respondent's claim valid, and ordered the insurance money paid to respondent (R. 46-47).

Mrs. Moreno was the only beneficiary of and the executrix named in the 1919 will (R. 73-74). She filed a declination to act as such executrix on October 28, 1937 (R. 64, 91) and applied for the appointment of the petitioner, Roberts, as administrator c. t. a. (R. 74). While consistently asserting in the various Florida proceedings that Major Moreno's domicile at death was in the District of Columbia and that she was entitled to the insurance money as domiciliary representative there appointed, she simultaneously procured from the Massachusetts probate court an *ex parte* decree that the Major was domiciled in Brookline, Massachusetts, at the time of his death (R. 35, 78). That decree was not brought to the attention of the Florida probate court of the District Court until the present petitioner intervened following Mrs. Moreno's defeat.

***Rules of Civil Procedure for the District Courts of the United States.**

ARGUMENT

As appears from the statement in this brief of the questions involved, respondent disagrees that the "questions of law involved", as stated at pages 4 to 5 of the petition for certiorari, are, in fact, involved. Respondent submits that petitioner's questions are supposititious and his argument largely academic.

Point I of petitioner's argument presupposes that Massachusetts was Major Moreno's domicile at death, while his specification of error is that the District Court should have tried the case "on the merits on the question of domicile" (petitioner's brief, p. 12).

The courts below were not confronted with the question of the effect of the Florida probate "on the courts of Massachusetts", to which Point II and III of petitioner's brief are addressed. Moreover, the courts below did not rely upon the probate, *per se,* of the Major's will, but upon a decree of a court of admitted jurisdiction over the subject matter and the litigants, adjudging the validity of the will in a contest between the only two parties beneficially interested in the outcome and in the insurance money.

It is respectfully submitted that the petition and supporting argument disregard or show a failure to understand the true basis of the decision of the Circuit Court of Appeals. The rationale thereof appears from the following quotations from the court's opinion:

> "But the judgment of the Florida probate court rendered during the pendency of the interpleader case settles who is the beneficial owner of this money, and a court of equity having it in its hands need not enter on a litigation to determine domicile

so as to pay it to the correct trustee, if it has the beneficial claimants before it and knows which of them ought to get it. There are no debts to be paid. Under one will Mrs. Moreno is entitled to the money; under the later will Mrs. Bathurst is entitled. Mrs. Moreno and Mrs. Bathurst have confronted one another in the Florida probate court on the issues whether that court had jurisdiction as the court of domicile, and whether the later will was the true last will.

* * * * * * * *

Roberts asserts that he is not party to and is not bound by the Florida court's decision, and that Mrs. Bathurst is bound as to him by the probate of the other will in Massachusetts. The Massachusetts probate, as an *in rem* proceeding, would protect Roberts in his administration in Massachusetts of any assets there. But it was made only on constructive service. We do not think it is available in Florida to override the adjudication made there on an actual contest between the interested parties. Roberts himself has no substantial rights. He was appointed administrator on the consent of Mrs. Moreno, and appears to have stood by awaiting the result of her contest with Mrs. Bathurst in the Florida probate court. Immediately after her defeat he entered the interpleader case. Even if Massachusetts can be held the true domicile and he the payee of the policy, still to avoid circuity of action this court of equity would not pay him the money to take to Massachusetts and compel Mrs. Bathurst to follow it, subjecting her to an unnecessary burden and her money to unnecessary costs of administration."

We have found no other decision in point and petitioner has cited none. The decision below seems eminently cor-

rect. While a decision of a non-domiciliary court is not binding upon other states, it does bind the interests of all persons who appear and litigate therein, wherever the personal property which they claim is situate. Section 470 (3) Restatement of the Law, Conflict of Laws, reads:

> "A judgment in administration proceedings in *any* state is conclusive upon all persons who became subject to the jurisdiction of the court in such proceedings."

Hence, the decision of the Florida probate court binds Mrs. Moreno, whether she acts in person or through the studied intervention of another.

The argument suggested by the third question of law stated by petitioner to be involved (Petition, p. 5) overlooks first, that it is not the petitioner's province to advance the theoretical rights of the State of Massachusetts and, second, that petitioner now suggests those rights for the first time.

All argument addressed to Mrs. Moreno's rights as supposed "widow" (see particularly Points V and VI of petitioner's argument) overlooks the fact that Mrs. Moreno's status as widow was adjudicated adversely to her upon her application for dower in Florida. She there unsuccessfully attacked the divorce and petitioner cannot now be heard to attack it collaterally, if, indeed, he could ever be privileged to do so. We are not here concerned what the result would be if a Masachusetts court should refuse to give full faith and credit to or recognize by comity the various decrees in Florida admittedly binding on Mrs. Moreno and from which she did not appeal.

Adverting briefly to the suggestion that the decree of the Massachusetts probate court is binding on respondent,

because of constructive service upon her (R. 76), it should be mentioned that while the notice mailed to Mrs. Bathurst advised her that a certain instrument purporting to be Major Moreno's last will and testament would be offered for probate and that, in order to object, respondent must file written appearance in the Massachusetts court on or before November 24, 1937 (R. 76-77), no notice was given that the court would entertain or attempt to pass on the question of Major Moreno's domicile. We do not think it can be seriously argued that the Massachusetts decree purporting to adjudicate Major Moreno's domicile at death is binding on respondent anywhere, even in Massachusetts.

Petitioner's remaining points seem not to require answer. Point VII again presupposes Mrs. Moreno's status as a widow and would be more appropriate as a jury address in an alienation suit.

CONCLUSION

Petitioner litigates no interest of his own, only that of Mrs. Moreno. She is estopped by the judgment of the Florida probate court to assert the invalidity of the will under which respondent takes. She is also estopped by the judgment of the District Court of the United States for the Northern District of Florida to claim the specific fund here in question. In both courts she has personally appeared and has put in issue the domicile of the decedent. She has also unsuccessfully attacked the validity of the Florida divorce on the ground that the Major was not domiciled there at the time. From none of the adverse decrees has she appealed.

As Mrs. Moreno is clearly estopped and the petitioner asserts only her rights, it is submitted that petitioner is also estopped, and such clearly appearing by record evidence summary judgment was properly based thereon.

The petition should be denied.

Respectfully submitted:

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